App. 177. Such being the case where only one party makes the motion, it is hard to see how its scope and purpose can be wholly changed by the mere fact that the other party has made the same motion. If each party severally wishes merely to test the *legal sufficiency* of the evidence, why should the result of both efforts be to shift upon the court the wholly foreign question of the *weight* of the evidence? As was suggested by the Supreme Court of Wisconsin, "It is certainly a strained construction to hold that an assertion that there is no evidence against one is an admission that there is none in his favor; yet that is the result of the New York doctrine that a motion to direct a verdict is an admission that there is no quesion of fact for the jury." *Thompson* v. *Brennan* (1899), 104 Wis. 568.

It appears from the above quotation that the Wisconsin Supreme Court also dissents from the New York rule. It holds that in all cases of motions for directed verdicts the question is and always has been, "not whether there was any evidence to support the verdict, but whether there was any evidence to support a contrary verdict." And the same doctrine was reaffirmed in *Nat. Cash Register Co.* v. *Bonneville* (1903), 119 Wis. 222, where the court somewhat tartly requests counsel to cease quoting New York cases on this point. Iowa also holds against the New York rule, and in *German Savings Bank* v. *Bates Imp. Co.* (1900), 111 Iowa 435, the court condemned a contrary dictum in *Bank* v. *Milling Co.*, 103 Iowa 524, and squarely took the same position which is indorsed by the courts of Wisconsin and Minnesota.

THE RIGHT OF PRIVACY.—The right of privacy has at last been asserted by an American court of final resort. In a carefully prepared opinion in *Pavesich* v. *New England Life Ins. Co. et al.* (1905), — Georgia —, 50 S. E. Rep. 68, the Supreme Court of Georgia has brushed away the cobwebs of legal reasoning which have been alleged to stand in the way of an enforcement of this instinctively recognized right, and in a unanimous opinion written by Mr. JUSTICE COBB has forcefully and yet with judicial poise, maintained a principle, the general establishment of which would make mightily for the decencies of life. The defendant company, without the consent of the plaintiff, had obtained through its agent, who was also made a defendant, a photograph of plaintiff and published a reproduction of it in an advertisement in the *Atlanta Constitution*. Under the picture of plaintiff, appeared the following: "In my healthy and productive period of life, I bought insurance in the * * (plaintiff) company, and today my family is protected and I am drawing an annual dividend on my paid-up policies." By the side of plaintiff's picture was printed the likeness of a sickly and needy individual, who by appropriate language printed underneath, was made to bewail his own lack of similar forethought. The "moral" of this allegory was pointedly expressed. The plaintiff's name was not used. The action was for damages and the petition, after reciting the foregoing facts, alleged that plaintiff had never had insurance in the defendant company, had never made the statement attributed to him, and that the publication of the advertisement was malicious and tended to bring plaintiff into ridicule and contempt, especially with his friends who

knew that he had no policy in the defendant company, and was a breach of his right of privacy. The petition was demurred to generally and specially. The trial court sustained the demurrer on the ground that no cause of action was stated in the petition, and the case was taken on error to the Supreme Court.

The question involved, that of the existence of the right of privacy, has been widely discussed in legal and other periodicals and in the daily press during the last fifteen years, beginning with a scholarly article by Samuel D. Warren and Louis D. Brandeis, 4 *Harvard Law Review* 193. The other important articles are referred to in the opinion in the principal case. With two exceptions these articles strongly maintain the existence of the claimed right, and many of them sharply criticise the adverse doctrine laid down in the celebrated *Roberson* case, referred to later herein.

The cases in which the precise question has been squarely decided are few in number and have all arisen since 1890. In *Manola* v. *Stevens,* the Supreme Court of New York, upon an *ex parte* application, granted a preliminary injunction to complainant, an actress, photographs of whom in stage attire, were being circulated without her consent, and the defendant not appearing at the hearing, the injunction was made permanent. *New York Times,* June 15, 18 and 21, 1890; 4 *Harvard Law Review* 195, note 7. In *Mackenzie* v. *Soden Mineral Springs Co.* (1891), 18 N. Y. Supp. 240, the right of privacy was impliedly recognized in granting an injunction to restrain the unauthorized publication of a recommendation by plaintiff, a physician, of a proprietary medicine. The right was expressly recognized in *Schuyler* v. *Curtis* (1892), 15 N. Y. Supp. 787; but this case was afterward (1895) reversed on the ground that the person, whose alleged right of privacy was violated by the acts complained of (the making and placing in a public place of a statue of such person to represent a "typical philanthropist"), was dead, and that the right, if it existed at all, died with her. 147 N. Y. 434, 42 N. E. Rep. 22. And see a note to this case in 49 Am. St. Rep. 671, in which the decision of the court is approved. It will be noted that this reversal was not an adjudication as to the existence of such a right. Moreover the facts in that case were not such as to bring the question out in plain relief. In 1893 the existence of such a right was again affirmed by the Superior Court of New York City in *Marks* v. *Jaffa,* 26 N. Y. Supp. 908, where an injunction was granted restraining the publication of plaintiff's photograph in defendant's newspaper in a "popularity" voting contest. In the same year JUDGE COLT of the United States Circuit Court declined to grant an injunction to restrain the publication and sale of a biographical sketch of Corliss, the inventor, and the printing and sale of his picture, on the ground that Mr. Corliss was a public man, who could not have asserted this right in his life-time, and that certainly it could not be asserted by his family after his death. But JUDGE COLT in that case said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or

of oral lectures delivered by a teacher to his class." *Corliss* v. *Walker,* 57 Fed. Rep. 434; Id. 64 Fed. Rep. 280, 31 L. R. A. 283, and note. In 1894, in *Murray* v. *Gast Lithographic Co.,* 28 N. Y. Supp. 271, the Court of Common Pleas of New York City and County, held that injunction should not be granted to a person to restrain the publication of a portrait of his infant child; but the existence of the right of privacy was not denied. And so, in 1899, in *Atkinson* v. *Doherty,* 121 Mich. 372, 80 N. W. Rep. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219, it was held that injunction will not lie to restrain the use of the name and likeness of a deceased person as a label for a brand of cigars. The court laid down the broad proposition that "so long as such use does not amount to a libel" the person whose name or likeness is thus published has no remedy or redress. But as the only question, a decision of which was necessary, was as to whether the right of privacy if it exists at all, is personal, and dies with the person, this case is not authority for denying the right of privacy.

The most important case on the subject, and the only one prior to the principal case, in which the question is squarely decided is *Roberson* v. *Rochester, etc. Co.* This was an application for an injunction to restrain defendant from publishing the likeness of plaintiff, a young woman, in an advertisement of a brand of flour, copies of which advertisement were placed in hotels, saloons and other public places. A demurrer to the complaint, on the ground that it did not state a cause of action, was overruled by the Supreme Court of Monroe County, at special term, 1890. 65 N. Y. Supp. 1109. On appeal, this interlocutory judgment was affirmed by the unanimous decision of the Supreme Court, Appellate Division. 71 N. Y. Supp. 876. This decision was reversed by the Court of Appeals in June, 1902, by a vote of four to three, the majority opinion being by PARKER, C. J., and the dissenting opinion by GRAY, J., 171 N. Y. 539, 64 N. E. Rep. 442, 89 Am. St. Rep. 828 and note, 59 L. R. A. 478. While the decision of the court is limited to a denial of the right to restrain the unauthorized publication of one's likeness for advertising purposes, yet JUDGE PARKER'S entire argument is, in effect, a denial of the "right of privacy, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers." (P. 544).

From this hasty review of the decided cases, it will be seen that prior to the Georgia case, the right of privacy had been impliedly recognized in *Mackenzie* v. *Mineral Springs Co.,* supra, and expressly recognized in one *ex parte* hearing, *Manola* v. *Stevens,* supra, and in five other hearings, *Schuyler* v. *Curtis,* supra (two trials), *Marks* v. *Jaffa,* supra, and *Roberson* v. *Rochester, etc. Co.* (two trials), supra, all in trial or intermediate appellate courts of New York; that of the latter five cases, one, *Schuyler* v. *Curtis,* was reversed on the ground that the right, if it existed at all, died with the person; and that in another case, *Roberson* v. *Rochester etc. Co.,* supra, the existence of the right at all, was squarely denied; also that an enforcement of the right was denied in *Corliss* v. *Walker,* supra, and in *Atkinson* v. *Doherty,* supra, on the same

ground relied upon in the *Schuyler* case, but with a dictum in the *Corliss* case recognizing the existence of the right in the person himself; and a dictum in the *Atkinson* case, squarely denying that the right exists at all. Therefore, despite the heavy blow dealt to the then growing recognition of this right by the decision expressed by JUDGE PARKER in *Roberson* v. *Rochester etc. Co.*, supra, in view of the strong dissenting opinion by JUDGE GRAY in that case, the decisions of lower New York courts and the preponderance of opinion of legal writers in favor of the existence of the right the Georgia court came to the question in the principal case, with "authority" pretty evenly divided. The objections urged against a legal recognition of the right were clearly and forcibly stated by JUDGE PARKER in the *Roberson* case, and may be summarized as falling under one or more of the following heads: 1. The lack of precedents precisely in point, and of recognition of the right by commentators on the law. 2. That the right is difficult to define, and that to judicially recognize it, would "open the flood-gates of litigation." 3. That recognition of such a right would restrict liberty of speech and freedom of the press. Taking these objections up in order, it may be said: (1) That while the courts which have denied the existence of the right, admit that the lack of exact precedent is not a fatal objection, yet one is impressed in reading their arguments with the fact that they are nevertheless powerfully influenced by their failure to find such precedents. But the previous non-assertion of this right by the courts is of course not fatal to its existence, novel though it be, as applied to the particular facts of any case, if it can be shown to be included in, or an aspect of, one of the great rights or principles of the common law. Failure to keep this truism in mind has resulted in these courts assuming a position, which to the writer seems somewhat timid, technical and unprogressive. But it is insisted by JUDGE GRAY and by the Georgia court that this right of privacy, or of the "inviolate personality" as the authors of the *Harvard Law Review* article (supra) phrase it, or the right "to be let alone" as JUDGE COOLEY tersely puts it (COOLEY ON TORTS, 2nd ed., p. 209), has been many times judicially asserted in analogous cases. Thus, the right is recognized in the remedies afforded for private nuisances resulting from noises interfering with one's enjoyment of his home, and in the remedies against eavesdroppers (4 Bl. Comm. 168), against common scolds (Id.), and in the common law rights of the people "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." The right to prevent the unauthorized publication of one's private letters, even though possessing no literary or financial value, or of lectures delivered to a class are other familiar examples. And so injunctions have been granted to restrain the unauthorized publication or use of recipes, writings and etchings. *Yovatt* v. *Wingard*, 1 J. & W. 394; *Abernethey* v. *Hutchinson*, 1 H. & L. 28, 3 L. J. (o. s.) Ch. 209; *Prince Albert* v. *Strange*, 2 De Gex & Sm. 652. In *Tuck* v. *Priester*, 19 Q. B. D. 629, the defendant was enjoined from publishing or selling copies of a picture owned by plaintiff, which he had been employed to copy; and in *Pollard* v. *Photo. Co.*, 40 Ch. Div. 345, defendant was restrained from selling photographs of the plaintiff, who had sat for his photograph in defendant's studio.

While it is true that these decisions were based in part upon property rights, or upon threatened breaches of contract, express or implied, or upon breaches of trust or confidence, there is great cogency in the following quotation from JUDGE COBB'S opinion in the principal case: "The true lawyer, when called to the discharge of judicial functions, has in all times, as a general rule, displayed remarkable conservatism; and, wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases both in England and in this country which really protected the right of privacy, were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust and contract." Moreover the conception of "property" is an ever widening one, and if it be broad enough to include the intangible, undivided interest which one has in a franchise or other incorporeal thing, or in one's valueless private letters, or the right which one has to enjoin the sale of photographs struck off from a negative for which plaintiff sat in the defendant's studio, may it not also include the right one has in his face, or portraiture, "until the use has been granted away?"

The second objection, that this right is difficult to define, and that its recognition would "open the flood-gates of litigation," may be briefly dismissed with the question, What of it? It is the business of the courts to define rights and principles, and if a mass of litigation ensues, this, of itself, tends to show that wrongs exist which need righting. If the litigation be legitimate—so much the better. If it be purely litigious the courts, and if need be, the legislature, can apply effective restrictions. And in answer to JUDGE PARKER'S suggestion, that if there be such a right, it should be formulated by the legislature and not by the courts, may it not be answered that the courts, with the trained ability of their judges, their latitude of action and their discretion in granting or refusing the redress sought, as the particular facts may seem to require, are far better adapted to the proper definition and enforcement of this right, than is the legislature which must act through hard and fast formulation?

As to the third objection, that the enforcement of this right would abridge liberty of speech and freedom of the press, it is sufficient to say that that liberty and freedom are and must always be abridged in submission to many demands of public policy. Instances of this are too obvious and too well known to require recital here. Enforcement of the right of privacy would not *unduly* abridge such freedom of speech, because all must admit that this right must itself be restricted and give way when public policy requires it, as in such obvious cases as those of the candidate for public office, or other public personages, whose lives, deeds and opinions the public welfare demands must always be open for public discussion. If these views are correct, the Supreme Court of Georgia has rendered a public service of greatest importance in thus vindicating a right instinctively recognized by all men, and in affording another proof of the boasted elasticity and adaptability of the Common Law.